Filed 1/15/19 Johnson v. Martinez CA4/1

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

RODNEY V. JOHNSON, as Executor, etc., Plaintiff and Respondent, v. DANIEL GABINO MARTINEZ et al., Defendants and Appellants.	D073175 (Super. Ct. No. 37-2016-00031157-CU-OR-CTL)

APPEAL from a judgment of the Superior Court of San Diego County, Gregory W. Pollack, Judge. Affirmed.

Daniel Gabino Martinez and Stephany Halene Martinez, in pro. per., for Defendants and Appellants.

Law Offices of Timothy J. Galvin and Timothy J. Galvin for Plaintiff and Respondent.

This case involves a boundary dispute between adjacent property owners. Decades ago, Daniel Gabino and Stephany Halene Martinez (defendants) agreed with their backyard neighbor, Ruth Johnson, to build a concrete wall at what they believed was the boundary between their two lots.[1] After Ruth passed away, Rodney as executor to her estate tried to sell. When a survey revealed that the wall stood entirely on the Johnson property, Rodney filed an action to quiet title. On cross motions for summary judgment, defendants argued that Ruth had consented to the wall's placement and invoked statute of limitations and unclean hands as affirmative defenses; Rodney urged the court to grant judgment based on the survey. The trial court granted Rodney's motion, denied defendants' motion, and entered judgment in Rodney's favor. Defendants appeal the judgment.

As we explain, once Rodney met his burden as the moving party on summary judgment, the burden shifted to defendants to show a triable issue of fact, including on one or more affirmative defenses. Defendants did not meet that burden. They produced no *evidence* that Rodney destroyed the wall before filing suit to support their unclean hands defense. They expressly disclaim adverse possession or a prescriptive easement, rendering the five-year statute of limitations inapplicable. (Code Civ. Proc., §§ 318 & 319.)[2] As to the agreed-boundary doctrine, the trial court correctly found it inapplicable

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1 To avoid confusion we refer to Ruth and Rodney Johnson by their first names, intending no disrespect.

2 Further statutory references are to the Code of Civil Procedure unless otherwise indicated.

without any evidence of uncertainty about the true boundary. And finally, absent any written evidence, defendants cannot claim a right to use the encroachment pursuant to an easement, covenant, or equitable servitude. Accordingly, the court properly granted Rodney's motion.

FACTUAL AND PROCEDURAL BACKGROUND

Ruth purchased her home at 3570 Addison Street (Lot 20) in Point Loma in 1972. Four years later, defendants bought a home on the parallel street, at 3549 Carleton Street (Lot 17). The two properties shared a backyard boundary. Sometime between 1976 and 1980, defendants built a concrete wall to replace an existing wooden fence. Ruth consented to the project and to the location of the wall.

Decades passed. Ruth died in 2015, and a year later Rodney became the executor of her estate. He agreed to sell the property to third-party buyers. In preparation for the sale, Berggren & Associates conducted a survey in June 2016 and determined the wall fell entirely within the property line for the Johnson property. The buyers asked to have the wall removed.

Rodney's attorney sent defendants a letter attaching the plat map and survey. Dan Martinez responded that the wall had been constructed 35 years ago in the same location as an existing fence. Citing section 315, he claimed the statute of limitations to commence a quiet title action had elapsed. Further efforts to resolve the matter failed.

In September 2016 Rodney filed suit seeking to quiet title (§ 760.020) and obtain declaratory relief. Defendants filed a verified answer and asserted affirmative defenses. They claimed Rodney's suit was foreclosed by the statute of limitations, Ruth's consent to

the wall's location, and Rodney's unclean hands in allegedly tearing down the wall before filing suit.[3]

In June 2017 defendants moved for summary judgment based on their affirmative defenses. Citing Ruth's alleged consent to the wall's location, they argued the action was barred under equitable estoppel, maxims of jurisprudence, contract, implied contract, and principles governing easements, servitudes, and covenants running with the land. Next, they argued Rodney had unclean hands because he demolished the wall and adjacent flower beds. Finally, they contended the statute of limitations elapsed. In conjunction with their motion, they filed a joint affidavit and included a "statement of uncontroverted facts" within the body of their opening brief. Opposing defendants' motion, Rodney did not dispute that defendants constructed the wall believing the existing wooden fence established the boundary and had placed it in its location with Ruth's direction and consent.

In July, Rodney filed a cross motion for summary judgment. He argued the survey established the boundary notwithstanding construction of the wall. A supporting declaration by surveyor John Berggren stated the wall between lots 20 and 17 was located entirely on Rodney's property. In their short opposition, defendants conceded "[t]he Survey is not in dispute and the location of the wall is not in dispute." They submitted a

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[3] "The doctrine of 'unclean hands,' which applies equally to law and equity, 'demands that a plaintiff act fairly in the matter for which he seeks a remedy. He must come into court with clean hands, and keep them clean, or he will be denied relief, regardless of the merits of his claim.' " (*DD Hair Lounge, LLC v. State Farm General Ins. Co.* (2018) 20 Cal.App.5th 1238, 1246.)

joint affidavit but did not respond to Rodney's separate statement. A week *after* Rodney filed his reply brief, defendants replied to his proposed separate statement. They questioned whether Rodney had legal title to Lot 20, claiming title remained with Ruth. But they did not dispute that a survey was conducted in 2016 and that the wall was located "entirely on [Rodney's] lot and is not on the property line." They implied (contrary to earlier claims) that the wall could be a privacy wall, not a boundary.

The court denied defendants' summary judgment motion in September 2017. Although they proffered conclusory evidence that Ruth consented to the wall's location, they did not introduce anything to suggest there was uncertainty as to the true boundary prior to construction of the wall. Accordingly, triable issues remained as to whether the narrow agreed-boundary exception to legal title applied. (*Bryant v. Blevins* (1994) 9 Cal.4th 47, 55 (*Bryant*) ["title by agreed boundary" requires proof of "an uncertainty as to the true boundary line"].)

In October, the court granted Rodney's summary judgment motion. Defendants did not dispute that the wall was located entirely on Rodney's property. Instead, they relied on Ruth's consent to the wall's placement. Despite Ruth's acquiescence, the court found no triable issue as to whether the agreed-boundary doctrine or statute of limitations foreclosed Rodney's quiet title action:

> "Defendants have not submitted any evidence that consent for the fence arose from uncertainty by the coterminous land owners followed by an agreement between them fixing the line. In fact, they appear to be disputing whether the fence is a purported boundary fence, instead maintaining that it is a 'privacy wall.' Moreover, defendants[']' own claim that plaintiff's predecessors consented to defendant's building of the wall and use of the land effectively bars

> any claim for adverse possession by defendants. 'If the owner permits one to use the land, the possession is not adverse.' [Citation.] Thus, any assertions by defendants based on adverse possession, including any defense based upon the statute of limitations for adverse possession, are inapplicable."

DISCUSSION

Defendants do not dispute the validity of the survey and concede the wall was located entirely on Ruth's property. Nevertheless, they maintain the court erred in granting summary judgment based on various affirmative defenses. First, they argue the court failed to address whether the unclean hands doctrine precluded Rodney's quiet title action. Next, they contend the action is time-barred under sections 312 to 319. Finally, they maintain the court misapplied the agreed-boundary doctrine and failed to address whether Ruth's consent to the wall's placement 36 years ago created an equitable servitude. Addressing these arguments in turn, we conclude summary judgment in favor of Rodney was proper.

1. *General Principles Governing Summary Judgment Review Dispose of the Unclean Hands Defense and Arguments First Raised on Appeal.*

The trial court granted Rodney's motion for summary judgment, finding no triable issue of material fact on his quiet title claim and concluding he was entitled to judgment as a matter of law. "As the moving party, [Rodney] had the initial burden to show [he] was entitled to judgment." (*Santa Ana Unified School Dist. v. Orange County Development Agency* (2001) 90 Cal.App.4th 404, 411 (*Santa Ana*), citing § 437c, subd. (o)(1).) "[T]his burden did not include disproving defendants' affirmative defenses." (*Santa Ana*, at p. 411.) Once Rodney met that initial burden, defendants carried the

burden to produce admissible evidence showing a triable issue of fact. (*Ibid.*) To meet this burden, they could "not rely on defenses in pleadings without evidence to support them." (*Ibid.*; see § 437c, subd. (o)(2).)

We review an order granting summary judgment de novo, meaning independently. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 860.) Particularly pertinent to this appeal, " ' "we assume the role of a trial court and apply the same rules and standards which govern a trial court's determination of a motion for summary judgment." ' " (*Swigart v. Bruno* (2017) 13 Cal.App.5th 529, 536.) "In undertaking our independent review of the evidence submitted, we apply the same three-step analysis as the trial court. First, we identify the issues framed by the pleadings. Next, we determine whether the moving party has established facts justifying judgment in its favor. Finally, if the moving party has carried its initial burden, we decide whether the opposing party has demonstrated the existence of a triable, material fact issue." (*Chavez v. Carpenter* (2001) 91 Cal.App.4th 1433, 1438.)

These guiding principles prevent defendants from challenging summary judgment based on their unclean hands defense. "[H]ow the parties moving for, and opposing, summary judgment may each carry their burden of persuasion and/or production depends on *which* would bear *what* burden of proof at trial." (*Aguilar, supra,* 25 Cal.4th at p. 851.) Defendants carried the burden to prove any affirmative defense at trial. Therefore, it is immaterial that Rodney did not address defendants' unclean hands defense in his moving papers. (*Santa Ana, supra,* 90 Cal.App.4th at p. 411.) Once he met his initial burden as the moving party, it was up to defendants to proffer admissible evidence

creating a triable issue of material fact with respect to this defense. As we explain, defendants did not do so.

Defendants' short opposition brief to Rodney's motion did not mention the unclean hands defense, nor did their very belated response to Rodney's separate statement. Even if we construe evidence submitted in conjunction with their *affirmative* motion for summary judgment, defendants did not proffer any admissible evidence that Rodney destroyed the wall and adjacent flower beds—i.e., the sole basis for their unclean hands defense. Defendants variously argued that Rodney had unclean hands, was negligent, or created a nuisance by destroying the wall and flower beds in August 2016. Their separate statement, included within their opening brief, included no allegations regarding Rodney's destruction of the wall or flower beds.[4] The joint affidavit submitted in support of defendants' summary judgment motion likewise contains no factual allegations concerning this event. Although the verified answer made passing reference to Rodney's "destruction of the wall prior to commencing the action," "the party opposing a summary judgment motion . . . *cannot* rely on allegations in [their] verified pleading to oppose a motion." (*Kurokawa v. Blum* (1988) 199 Cal.App.3d 976, 988.)

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4 This fact alone could dispose of defendants' unclean hands argument. "[*A*]*ll* material facts must be set forth in the separate statement. 'This is the Golden Rule of Summary Adjudication: if it is not set forth in the separate statement, *it does not exist*." (*United Community Church v. Garcin* (1991) 231 Cal.App.3d 327, 337.) "[I]t is no answer to say the facts set out in the supporting evidence or memoranda of points and authorities are sufficient. 'Such an argument does not aid the trial court at all since it then has to cull through often discursive argument to determine what is admitted, what is contested, and where the evidence on each side of the issue is located." (*Id.* at p. 336.)

In his opposition to defendants' affirmative motion, Rodney compiled the various factual allegations contained in the body of defendants' moving brief and affidavit. For good measure, he included the statements found in the brief about the wall's destruction. He disputed the bare allegation that he "destroyed the wall, the flower beds, and entered the enclosure and cut off 2 feet off a cement brick wall that enclosed the backyard one August 1, 2016." He further objected that defendants' assertion lacked foundation and assumed facts not in evidence. (Evid. Code, §§ 403, 210.) The trial court did not rule on Rodney's objection, but we agree that defendants produced no admissible evidence to support their claim concerning his alleged destruction of the wall.

We recognize that defendants are not represented by counsel. But self-represented litigants are generally held to the same substantive standards as attorneys. (See *Kobayashi v. Superior Court* (2009) 175 Cal.App.4th 536, 543.) "Except when a particular rule provides otherwise, the rules of civil procedure must apply equally to parties represented by counsel and those who forgo attorney representation." (*Rappleyea v. Campbell* (1994) 8 Cal.4th 975, 984−985.) By failing to proffer admissible evidence underlying their theory of unclean hands, they did not meet their burden to show a triable issue based on this affirmative defense. And, because "[w]e cannot consider any issues not factually presented in the trial court" (*Santa Ana, supra,* 90 Cal.App.4th at p. 412), this failure forfeits appellate review of their claim that summary judgment is improper because Rodney had unclean hands.

Principles governing summary judgment review likewise prevent us from addressing a host of arguments raised for the first time in defendants' reply brief on

appeal. For example, defendants argue without elaboration that summary judgment was improper because paragraphs three through eight of the complaint "[have] not been proven."[5] They challenge alleged discovery violations and question whether the survey and plat map establish proof of legal title. In addition, they claim the record does not show timely service of defendants' motion and imply Rodney has been unjustly enriched at their expense. Of these, only the timely service and discovery arguments were even raised before the trial court. None of these arguments was mentioned in defendants' opening brief.[6]

Although our review is de novo, we do not consider arguments raised for the first time on appeal. (*North Coast Business Park v. Nielsen Construction Co.* (1993) 17 Cal.App.4th 22, 29 [permitting a change of theory on appeal from the grant of a summary judgment would be "manifestly unjust to the opposing parties, unfair to the trial court, and contrary to judicial economy"]; *Uriarte v. United States Pipe & Foundry Co.* (1996) 51 Cal.App.4th 780, 791 (*Uriarte*) [" 'in reviewing a summary judgment, the appellate

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5 The complaint alleges that: Rodney is ignorant of identities of the Doe defendants (¶ 3); each defendant claims an interest in the property (¶ 4); Rodney seeks to quiet title against every claim including any unrecorded interest in title or use held by defendants (¶ 5); defendants do not have right, title, or interest in any portion of the property (¶ 6); an actual controversy exists between the parties as to whether defendants had an unrecorded right to ownership or use (¶ 7); and Rodney seeks a judicial determination of the parties' rights and duties to procure title insurance for a third-party sale (¶ 8).

6 To the extent defendants argue Rodney's motion for summary judgment violated procedural rules without an affidavit, the contention lacks merit. "[T]he summary judgment statute authorizes 'affidavits' *and* 'declarations' to support and oppose such motions," and Rodney properly submitted the surveyor's declaration in support of his motion. (*Kulshrestha v. First Union Commercial Corp.* (2004) 33 Cal.4th 601, 609, italics added.)

court must consider only those facts before the trial court, disregarding any new allegations on appeal . . . *possible theories that were not fully developed or factually presented to the trial court cannot create a "triable issue" on appeal*' "].) Moreover, "[i]t is axiomatic that arguments made for the first time in a reply brief will not be entertained because of the unfairness to the other party." (*People v. Tully* (2012) 54 Cal.4th 952, 1075.)

" 'Fundamentally, unlike trial, the purpose of an appeal is *not* to determine the case on its merits, but to review for trial court error.' " (*Uriarte*, *supra*, 51 Cal.App.4th at p. 791.) Guided by principles of summary judgment review, we consider only those arguments that were presented below and properly framed on appeal: (1) whether Rodney's action for quiet title is time-barred, and (2) whether a triable issue exists pursuant to the agreed-boundary doctrine or the law of equitable servitudes.

2. *Because Defendants Disavow Adverse Possession or a Prescriptive Easement, the Statutes of Limitation Under Sections 318 and 319 Do Not Apply.*

In their opposition papers, defendants argued Rodney's quiet title action was time barred because the wall had been in the same location for 36 years. They cited section 312 [actions to recover real property must be brought "within the periods prescribed in this title"], section 315 [10-year limitations period for suits brought by the People of the State of California], and sections 318 and 319 [five-year limitations period within seisin].) They also referenced section 337.1, subdivision (a), which provides a four-year statute of limitations for certain suits for damages from patent construction defects, and

section 337.15, subdivision (a), which provides a 10-year limitations period for latent construction defects. Defendants rely on these same provisions on appeal.

We can quickly dispose of defendants' reliance on section 315. That statute "is not relevant. It concerns an action by the People of the State of California for rights relating to real property." (*Martin v. Van Bergen* (2012) 209 Cal.App.4th 84, 91 [limitations period in section 315 did not apply to quiet title action between neighbors concerning disputed boundary].) Likewise, Rodney did not seek damages from construction defects but rather to quiet title. Sections 337.1, subdivision (a) and 337.15, subdivision (a) do not apply.

That leaves sections 318 and 319, which pertain to adverse possession. "The true owner may bring an action [to quiet title] at any time within 5 years after the commencement of the adverse possession." (12 Witkin, Summary of Cal. Law (11th ed. 2017) Real Property, § 244, p. 299.) "To maintain the action, the plaintiff must show that the plaintiff, or the plaintiff's ancestor, predecessor, or grantor, was 'seized or possessed' of the property within 5 years before the commencement of the action." (*Ibid*.)[7]

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[7] Section 318 provides: "No action for the recovery of real property, or for the recovery of the possession thereof, can be maintained, unless it appear that the plaintiff, his ancestor, predecessor, or grantor, was seized or possessed of the property in question, within five years before the commencement of the action." Section 319 applies to other types of actions: "No cause of action, or defense to an action, arising out of the title to real property, or to rents or profits out of the same, can be effectual, unless it appear that the person prosecuting the action, or making the defense, or under whose title the action is prosecuted, or the defense is made, or the ancestor, predecessor, or grantor of such person was seized or possessed of the premises in question within five years before the commencement of the act in respect to which such action is prosecuted or defense made."

Adverse possession requires the following elements: "(1) possession under claim of right or color of title; (2) actual, open, and notorious occupation of the premises constituting reasonable notice to the true owner; (3) possession which is adverse and hostile to the true owner; (4) continuous possession for at least five years; and (5) payment of all taxes assessed against the property during the five-year period." (*Mehdizadeh v. Mincer* (1996) 46 Cal.App.4th 1296, 1305 (*Mehdizadeh*).)[8] Critically, it requires a hostile or adverse claim to that of the true owner. (12 Witkin, Summary of Cal. Law (11th ed. 2017) Real Property, § 227, p. 287.) "If the owner permits the person to use the land, the possession is not adverse." (*Ibid.* [collecting cases].) The trial court explained that because defendants admitted they installed the wall with Ruth's consent, their possession of Ruth's land was not adverse. Consequently, it concluded Rodney's action was not barred by the statute of limitations applicable to recover property taken by adverse possession.

Because the judgment is presumed correct, the appealing party must establish reversible error. (*Swigart, supra*, 13 Cal.App.5th at p. 535.) Defendants might have argued they could prove adverse possession or a prescriptive easement notwithstanding Ruth's consent. In *Sorensen v. Costa* (1948) 32 Cal.2d 453, the Supreme Court explained

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8 A prescriptive easement confers use, not title, to another's property but requires similar elements. (*Mehdizadeh*, *supra*, 46 Cal.App.4th at p. 1305. ["To establish the elements of a prescriptive easement, the claimant must prove use of the property, for the statutory period of five years, which use has been (1) open and notorious; (2) continuous and uninterrupted; (3) hostile to the true owner; and (4) under claim of right."].) As with adverse possession, "[p]rescription cannot be gained if the use is permissive." (12 Witkin, Summary of Cal. Law (11th ed. 2017) Real Property, § 418, p. 483.)

that possession may be adverse even where the record owner is unaware of his or her rights to the property—all that matters is that the occupation give the owner notice that the possessor claims the property as his or her own. (*Id.* at p. 459.) On the other hand, where there is confusion over the boundary and a claimant merely intends to claim the true line wherever it may be, possession is not adverse "absent an intention to claim the land in dispute as his own." (*Id.* at p. 460; see *Gilardi v. Hallam* (1981) 30 Cal.3d 317, 326 [where defendants take possession of disputed land mistakenly believing they were the owners and the record is silent as to whether they expressly or impliedly recognized the record owners' potential claim or intended to claim only to the true property line, then possession is deemed adverse].)

But defendants do not draw this distinction on appeal. They *agree* with the trial court's conclusion that their possession was not adverse. In their opening brief, defendants highlight "[t]he undisputed fact that the Johnsons gave consent" for the wall and emphasize that they "never claimed a prescriptive easement or adverse possession." On reply, they stress that they "have never plead [*sic*] 'Adverse Possession.' "[9] Their

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9 Defendants perhaps adopted this position because they could not prove they paid taxes on the disputed property, as required for adverse possession. (*Mehdizadeh*, *supra*, 46 Cal.App.4th at p. 1305; *Pra v. Bradshaw* (1953) 121 Cal.App.2d 267, 270 [appellants could not argue adverse possession absent proof they paid taxes on the encroaching strip of land occupied by a constructed wall].) Or perhaps in constructing the wall they merely intended to occupy the land up to their property limit wherever that might be. (*Sorensen v. Costa*, *supra*, 32 Cal.2d at p. 460.) Moreover, given the nature of the wall, defendants may not have been able to claim a prescriptive easement. (*Harrison v. Welch* (2004) 116 Cal.App.4th 1084, 1093 (*Harrison*) ["an exclusive prescriptive easement, 'which as a practical matter completely prohibits the true owner from using his land' [Citation], will not be granted in a case (like this) involving a garden-variety residential boundary

novel argument raised for the first time on reply that they had title to the *wall* and thereby acquired the right to use "the land that is appurtenant *to the wall*" is not supported by their cited authority. (Civ. Code, § 658 [real property includes "[t]hat which is incidental or appurtenant to *land*"].)

Defendants' disavowal of adverse possession or prescriptive easement theories defeats their statute of limitations challenge under sections 318 and 319. " '[T]o start the statute to running against the legal owner of the land, there must be an avowed claim of ownership by the party relying upon the statute and substantially all the elements essential to the establishment of title by adverse possession shown to exist.' " (*Harrison, supra,* 116 Cal.App.4th at p. 1096, italics omitted.) "The same rule applies to a claim of prescriptive easement. [Citation.] Thus, unless and until the encroacher's use of the property ripens into title by adverse possession or a valid prescriptive easement, the legal title holder's right to bring an action to recover his or her property from the encroacher *never* expires." (*Ibid*.) The court did not err in granting summary judgment notwithstanding defendants' statute of limitations argument.

3. *The Court Properly Applied the Agreed-Boundary Doctrine, and Absent a Writing Defendants Cannot Claim an Easement, Covenant, or Equitable Servitude.*

That brings us to the heart of defendants' appeal. In their affirmative motion for summary judgment, defendants raised a host of arguments variously framed as arising under equitable estoppel, implied contract, easements and servitudes, and unspecified

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encroachment"]; *Kapner v. Meadowlark Ranch Assn.* (2004) 116 Cal.App.4th 1182, 1187 ["Because Kapner enclosed and possessed the land in question, his claim to a prescriptive easement is without merit."]; *Silacci v. Abramson* (1996) 45 Cal.App.4th 558, 564 [exclusive prescriptive easement had "no application to a simple back yard dispute"].)

maxims of jurisprudence. All of these arguments rested on a central premise that Ruth's consent to the wall's placement foreclosed Rodney's quiet title action. The trial court believed defendants to be making an argument based on the "agreed boundary doctrine." Citing *Bryant, supra*, 9 Cal.4th 47, it concluded that doctrine did not apply absent evidence the wall was placed in that location to resolve an existing boundary dispute.

On appeal, defendants maintain they had never relied on the agreed-boundary doctrine. They nevertheless suggest the court misapplied that doctrine and that it might offer a valid defense to Rodney's quiet title action. In addition, defendants argue the court failed to consider whether Ruth's consent to the wall's location created an unrecorded equitable servitude. We address these arguments in turn and find no error.

a. *Agreed Boundary Doctrine*

"The agreed-boundary doctrine is an exception to the general rule, which accords determinative legal effect to a description of land contained in a deed. As an exception, the doctrine may be invoked only under specific circumstances. The party claiming the land pursuant to the doctrine bears the burden of establishing that there is ' "[1] an uncertainty as to the true boundary line, [2] an agreement between the coterminous owners fixing the line, and [3] acceptance and acquiescence in the line so fixed for a period equal to the statute of limitations or under such circumstances that substantial loss would be caused by a change of its position." ' " (*Mehdizadeh, supra*, 46 Cal.App.4th at pp. 1302–1303, quoting *Bryant, supra*, 9 Cal.4th at pp. 54−55.) "Where no evidence shows that prior owners of adjoining parcels agreed to resolve a boundary dispute and

where legal records provide a reasonable basis for fixing the boundary, the agreed-boundary doctrine does not apply." (*Mehdizadeh*, at p. 1303.)

The trial court agreed with defendants that Ruth had acquiesced in the wrong boundary. Nevertheless, it found the doctrine inapplicable because defendants submitted no evidence "that consent for the fence arose from uncertainty by the coterminous land owners followed by an agreement between them fixing the line." This was plainly correct under *Bryant*, *supra*, 9 Cal.4th 47, a quiet title action that governs here.

In *Bryant* the plaintiff's predecessor had long acquiesced to the presence of a fence dividing two lots, but the record was silent as to why the fence was built and legal records provided a basis for fixing the boundary. (*Bryant*, *supra*, 9 Cal.4th at p. 58.) The Supreme Court agreed that the agreed boundary doctrine could not be invoked in this context. (*Ibid.*) "Although the presence of the fence since at least 1977 suggests a lengthy acquiescence to its existence . . . , that circumstance alone did not nullify . . . other requirements—namely, that there be an uncertainty as to the location of the true boundary when the fence was erected, and an agreement between the neighboring property owners to employ the location as the means of establishing the boundary." (*Ibid.*) As the court explained, "when existing legal records provide a basis for fixing the boundary, there is no justification for inferring, without additional evidence, that the prior owners were uncertain as to the location of the true boundary or that they agreed to fix their common boundary at the location of a fence." (*Ibid.*)

Defendants acknowledge *Bryant*'s rule but argue that because Ruth passed away, "it can only create an un-rebuttable presumption that there was some sort of agreement to

the location of the fence that existed prior to the construction of the Party Wall." But *Bryant* explicitly rejects that notion—although the presence of the fence suggested "a lengthy acquiescence to its existence" by the prior owners, that was insufficient to infer it constituted an agreed boundary. (*Bryant, supra*, 9 Cal.4th at p. 58.) Indeed, defendants disclaimed that the wall was intended as a boundary at all, stating in their summary judgment papers that it was fixed in that location as a "privacy wall." (See generally, *id.* at p. 59 ["barriers are built for many reasons, only one of which is to act as a visible boundary between parcels of real property" (fn. omitted)].) The trial court correctly found the agreed-boundary doctrine inapplicable on this record.

b. *Easements, Covenants, and Equitable Servitudes*

Unlike adverse possession or the agreed-boundary doctrine, which give a successful claimant *title* to disputed real property, easements confer a nonposessory right to *use* someone else's property. (*Mehdizadeh, supra*, 46 Cal.App.4th at p. 1305; 12 Witkin, Summary of Cal. Law (11th ed. 2017) Real Property, § 396, p. 454.) Relying on sections 801 to 811 of the Civil Code, defendants next argue the trial court failed to consider whether they had a "servitude" in the Johnson property. Those statutes pertain to easements, including the rights "of using a wall as a party wall" and "of having the whole or a division fence maintained by a coterminus owner." (Civ. Code, § 801, subds. (12) & (14).) Defendants argue Ruth orally created an unrecorded easement by consenting to the wall's placement.

Defendants' theory is not viable absent a writing. Because an easement creates an interest in land, "it can only be created by grant, express or implied, or prescription, and

not by parol." (*Elliott v. McCombs* (1941) 17 Cal.2d 23, 30.) "[I]mplied easements are not favored by the law" and are found only where "reasonably necessary" for the use and enjoyment of the dominant tenement. (6 Miller & Starr, Cal. Real Estate (4th ed. 2018), §§ 15:19, 15:23.) Defendants did make that showing here. Moreover, they expressly disclaim any easement by prescription. Consequently, absent a writing, defendants cannot claim a right to use Ruth's property pursuant to an easement. They likewise cannot claim such right pursuant to a covenant or equitable servitude. (*Long v. Cramer Meat & Packing Co.* (1909) 155 Cal. 402, 405−406 [oral agreement not to use lands for sheep grazing "rested wholly in parol" and could not create a covenant running with the land or an equitable servitude]; see Civ. Code, § 1460 [covenants must be "contained in grants of estates in real property"]; 6 Miller & Starr, Cal. Real Estate (4th ed. 2018), § 16:9 ["An equitable servitude cannot be created without a writing."]; see generally, Civ. Code, § 1624, subd. (a)(3) [an agreement for an interest in real property must be in writing].)[10]

In short, defendants did not offer admissible evidence sufficient to raise a triable issue as to whether they acquired any possessory or use interest in Ruth's property. Because they did not negate an element of Rodney's quiet title action or establish a

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10 *Pacific Hills Homeowners Association v. Prun* (2008) 160 Cal.App.4th 1557, cited by defendants, is not on point. The case considered whether the statute of limitations applied to a violation of a condominium restriction where the restriction was *written* but *unrecorded*. (*Id.* at p. 1563.)

complete defense, the trial court properly concluded Rodney was entitled to judgment as a matter of law. (§ 437c, subd. (c).)

DISPOSITION

The judgment is affirmed. Respondent is entitled to recover his costs on appeal.

DATO, J.

WE CONCUR:

HALLER, Acting P. J.

IRION, J.